

**Current with amendments received through June 1, 2017.**

**Uniform Local Rules for All State Water Court Divisions**

**Rule 1. Appearances**

A party that is a corporation may act through its corporate officers or other nonlawyer agents for the purpose of filing applications and statements of opposition when a case is before the referee (or before the water judge acting as a referee); however, if a pleading supporting or protesting a referee's ruling is filed, except as otherwise provided by C.R.S. 13-1-127, a corporate applicant shall be represented by and the pleadings shall be signed by, an attorney licensed to practice law in the State of Colorado.

**Rule 2. Filing and Service Procedure**

(a) For all cases filed pursuant to C.R.C.P. 90 after July 1, 2009, applicants and opposers represented by counsel shall electronically file and serve through the approved judicial branch e-filing service provider all applications, pleadings, motions, briefs, exhibits, and other documents on all parties and on the state and division engineer. C.R.C.P. Rule 121, Section 1-26, Electronic Filing, applies to water court filings. The state or division engineer shall also electronically file and serve upon applicants and opposers in the proceedings their consultation reports described in §§ 37-92-302(2)(a) & (4). Applicants and other parties who are not represented by an attorney shall file with the water clerk a single copy of the application and all other documents in original paper format. The water clerk on behalf of persons not represented by an attorney shall scan and upload such paper-filed documents to the approved judicial branch e-filing system. All documents and correspondence filed after the initial application shall contain the case number. Proof of service of documents, orders, and rulings shall occur through the e-filing system.

(b) An applicant shall file and serve upon all parties at least 21 days prior to hearing on any application before the water judge, a proposed order that sets forth any necessary findings, terms or conditions that the applicant reasonably believes the court should incorporate into the decree.

**Rule 3. Applications for Water Rights**

(a) Applications filed under C.R.C.P. 90 for determination of a water right, determination of a conditional water right, a change of water right, a determination that a conditional water right has become a water right, approval of a plan for augmentation, a finding of reasonable diligence, approval of a proposed or existing exchange of water, approval to use water outside of the state, and any other matter for which such a standard form exists shall be filed using the standard forms adopted by the water judges, or a format patterned after the standard form containing the information required by the applicable standard form. The applicant shall be responsible for providing all information required by the forms and this Rule 3.

**(b)** (1) More than one water right, claim or structure may be incorporated in any one application under one caption, provided that the required information is given for each water right, claim, or structure.

(2) Persons alone or in concert may file applications for approval of plans for augmentation, including water exchange projects, and subsequent changes thereto.

(3) In applications for determinations of rights to groundwater described in C.R.S. § 37-90-137(4):

(A) If the applicant claims consent of the owner(s) of the overlying land as the basis for such a determination, the application must include one or more of the following documents as applicable:

i) If the basis for such consent is C.R.S. § 37-90-137(4)(b)(II)(A), the application must include (1) recorded copies of the written consent from the owner(s) of the overlying land to the applicant, which consent includes a legal description of the land and identification of the aquifers for which consent has been given, and (2) an instrument evidencing ownership of such land by such consenting owner(s) at the time such consent was granted.

ii) If the basis for such consent is C.R.S. § 37-90-137(4)(b)(II)(C), the application must include a certified copy of (1) the ordinance or resolution described in C.R.S. § 37-90-137(8) that incorporates groundwater, and (2) the part of the detailed map described in C.R.S. § 37-90-137(8) that shows the land area as to which consent is deemed to have been given.

(B) Two or more overlying land owners may file a joint application for determinations or changes of rights to such groundwater to be withdrawn through a “well field,” provided that the application must contain sufficient information to demonstrate that lands subject to the application meet the requirements of a “well field” as defined in the “rules and regulations applying to applications for well permits to withdraw groundwater pursuant to section 37-90-137(4), C.R.S.” 2 C.C.R. 402-7. Such joint application may include only claims for determinations or changes of rights to groundwater described in C.R.S. § 37-90-137(4) and plans for augmentation (with or without exchanges) related thereto.

(4) Nothing contained in this rule 3(b) shall prevent the consolidation or bifurcation of applications or portions thereof under other applicable rules or law, or affect or discourage applications involving a single applicant or single water right, claim or structure.

(c) Where more than one water right was conditionally decreed under one case number, each water right so decreed may, but need not be, incorporated again in a single application for a finding of reasonable diligence or to make absolute, regardless of whether such rights remain in common ownership; however, such an application shall not be combined with any other case or application except by leave of court and the owner of each such right shall be an applicant in such application.

**(d)** The following guidelines shall apply in filing applications:

(1) Every application shall include the legal description of the location of the point of diversion and of the place of storage, if any, of the subject water right, and a general description of the place of use.

(2) In areas having generally recognized street addresses, the street address and also the lot and block number, if applicable, shall be set forth in the application in addition to the legal description of the point of diversion or place of storage.

(3) Every application shall state the name and address of the owner or reputed owner of the land upon which any new diversion or storage structure or modification to any existing diversion or storage structure is or will be constructed, or upon which water is or will be stored, including any modification to the existing storage pool. The applicant may rely upon the real estate records of the county assessor for the county or counties in which the land is located to determine the owner or reputed owner of potentially affected land.

(4) The actual address of the applicant and the mailing address, if different, shall be given in all cases. An address in care of an attorney is not acceptable in the absence of special circumstances which must be set out fully in an accompanying statement and approved by the water judge.

(e) An application for determination of matters relating to underground water rights shall be governed by the following additional requirements:

(1) Such application shall designate each well, using the state engineer's well permit registration or recording number, if one exists. If a permit required by law has been issued by the state engineer, copies of the permit and the well completion and pump installation report, if completed, shall be attached to the application. If the permit was denied, a copy of the order of denial containing the denial number shall be attached. If this documentation is not available at the time of filing of the application, it shall be supplied as soon as practicable.

(2) If the name of the applicant is not the same as the name appearing on the well permit, then prima facie evidence of ownership of the well site must be submitted to the court. Copies of recorded deeds are preferred for this purpose.

(f) An application for approval of a change of water right or plan for augmentation shall include a complete statement of such change or plan, including a description of all water rights to be established or changed by the plan, a map showing the approximate location of historical use of the rights, and records or summaries of records of actual diversions of each right the applicant intends to rely on to the extent such records exist.

#### **Rule 4. Amendments or Corrections**

(a) For purposes of the application of C.R.C.P. 15, the application shall be considered to be a complaint, and a statement of opposition shall be considered to be a responsive pleading. An amendment to an application shall contain a legal description of the structures to which the amendment applies.

(b) When an application is amended, or a petition for correction of a ruling or decree is filed, republication shall be required at the expense of the applicant for the following changes:

- (1) A change of over 200 feet in structure location;
- (2) A change causing the well to come within 600 feet of an existing decreed well;
- (3) A change or moving of a structure to a different quarter section;
- (4) An increase in amount of use or addition of type of use, but not a decrease in amount of use or deletion of a type of use;
- (5) A request for an earlier date of appropriation;
- (6) A change in the source of water; or
- (7) Any other change not specifically described that the court in its discretion deems material.

(c) Upon a showing that no person will be injured, the water judge or referee may determine that republication is unnecessary.

#### **Rule 5. Withdrawal of Application or Other Pleading**

(a) An application against which no statement of opposition has been filed may be withdrawn upon written notice to the court and without a court order prior to the entry of a decree.

(b) An application against which a statement of opposition has been filed shall not be withdrawn or dismissed except by order of the court.

(c) A statement of opposition may be withdrawn without order of the court if the opposer files a withdrawal of the statement of opposition certifying that the applicant has consented to the withdrawal. In the absence of consent of the applicant, the withdrawal of a statement of opposition must be approved by order of the court.

#### **Rule 6. Referral to Referee, Case Management, Rulings, and Decrees**

(a) The water judge shall promptly refer to the water referee all applications except those the water judge determines to retain for adjudication. The referee upon referral by the water judge has the authority and duty in the first instance to promptly begin investigating and to rule upon applications for determinations of water rights, determinations of conditional water rights, changes of water rights, approval of plans for augmentation, findings of reasonable diligence in the development of conditional water rights, approval of a proposed or existing exchange of water, approval to use water outside of the state, and other water matters, in accordance with the applicable constitutional, statutory, and case law. Upon investigating the matter, the referee may re-refer an application to the water judge for adjudication.

(b) The referee's authorities and duties include: assisting potential applicants to understand what information is required to be included in an application; in accordance with C.R.C.P. 90, consulting with the water clerk to ascertain whether applications substantially contain the information required by Water Court Rule 3 and the standard forms approved by the water judges and, if not, providing the applicant through the water clerk a list of the required

information that was not included in the application; investigating each application to determine whether or not the statements in the application and statements of opposition are true and becoming fully advised with respect to the subject matter of the applications and statements of opposition; conferring with the division engineer and the parties concerning applications and working with the division engineer and the parties to obtain additional information that will assist in narrowing the issues and obtaining agreements; and issuing the referee's ruling and proposed decree in the case. The referee's ruling and proposed decree shall set forth appropriate findings and conditions as required by C.R.S. §§ 37-92-303 & 305, and shall be in an editable format acceptable to the water judge.

**(c)** The referee shall work promptly to identify applications that will require water judge adjudication of the facts and/or rulings of law and re-refer those applications to the water judge.

**(d)** The applicant shall have the burden of sustaining the application and, in the case of a change of water right, a proposed or existing exchange of water, or a plan for augmentation, the burden of showing the absence of injurious effect. If any expert reports, disclosures, or opinions are presented to the referee, they shall be filed and include the signed Declaration of Expert set forth in the applicable water court form.

**(e)** To promote the just, speedy, and cost efficient disposition of water court cases, the goals of the referee, as contemplated by C.R.S. § 37-92-303(1), shall include a ruling on each unopposed application within 63 days after the last day on which statements of opposition may be filed, and all other applications as promptly as possible. In pursuit of this goal, the referee shall initiate consultation with the division engineer in every case promptly after the last day for filing statements of opposition. The division engineer's written summary report of the consultation is due within 35 days of the date the referee initiates consultation in accordance with C.R.S. § 37-92-302(4), except that for applications that require construction of a well, the summary of consultation report is due within 4 months after the filing of the application in accordance with C.R.S. § 37-92-302(2)(a). Upon request, the referee may extend the time for filing the summary of consultation report. If the referee determines that the summary of consultation report requires a response, the applicant shall file a written response within the time specified by the referee either in the case management plan adopted under section (l) of this rule 6 or by a separate order under section (n) of this rule 6. The referee shall not enter a ruling on applications for determination of rights to groundwater from wells described in C.R.S. § 37-90-137(4) until the state engineer's office has had the opportunity to issue a determination of facts concerning the application in accordance with C.R.S. § 37-92-302(2)(a). The referee and the division engineer may confer and jointly agree to forego consultation in a particular case because it is not needed; and, if so, the referee shall enter a minute order as provided in section (o) of this Rule 6.

**(f)** For good cause, upon agreement of the parties, or sua sponte, the referee may extend the time for ruling on the application beyond 63 days after the last day on which statements of opposition may be filed but not to exceed a total of 1 year following the deadline for filing statements of opposition, except that the referee may extend the time for entering a ruling to a specified date that is not more than 182 days after the expiration of the one year period, upon finding that there is a substantial likelihood that the remaining issues in the case can be resolved, without trial before the water judge, in front of the referee.

**(g)** If no statements of opposition to an application have been filed, the applicant's attorney shall promptly provide the referee with a proposed ruling and decree for consideration by the referee. The referee will prepare the ruling and decree for pro se applicants, and in all cases may convene such conferences or hearings as will assist in performance of the referee's duties.

**(h)** For all applications in which statements of opposition are filed, the attorney for the applicant, or the referee if the applicant is not represented by counsel, shall set a status conference with the referee and all parties. The status conference shall occur within 63 days after the deadline for filing of statements of opposition, unless the deadline is extended by the referee for good cause. The status conference may be conducted in person or by telephone. All parties must attend the status conference unless excused by the referee. The referee shall advise the division engineer of the status conference and invite or require the division engineer's participation. To assist discussion at the status conference, applicants are encouraged to prepare and circulate a proposed ruling and proposed decree to the referee, the division engineer, and the parties in advance of the conference.

**(i)** During the status conference, the referee and the parties will discuss the issues raised by the application and any statements of opposition, what additional information or investigations will be necessary to assist the parties and the referee to understand and resolve disputed issues and to assist the referee's preparation of a proposed ruling and proposed decree, and determine whether it will be possible to resolve the application and any objections without re-referring the application to the water judge for adjudication.

(1) If it is unlikely that the application and objections can be resolved without adjudication by the water judge, then the referee shall promptly re-refer the application to the water judge in accordance with C.R.S. § 37-92-303.

(2) If the applicant or another party does not believe that the application can be resolved without water judge adjudication and so notifies the other parties and the referee at the status conference, then the party shall promptly file a motion to refer the application to the water judge in accordance with C.R.S. § 37-92-303(2).

(3) The provisions of Water Court Rule 6 (j)-(l) apply to applications that remain before the referee upon agreement of the parties as a result of the status conference.

(4) As a condition for remaining before the referee instead of referring the application to the water judge for adjudication, the parties shall waive their statutory right to re-refer the application to the water judge for the period established in the case management plan. During such period the application may be referred to the water judge only with the consent of all parties or the consent of the referee.

**(j)** The parties shall discuss at the status conference whether expert investigations will be needed. If expert investigations are needed, the referee and the parties will discuss whether it would be appropriate for the parties to engage a single expert to make the necessary investigation and report the results of the investigation to the parties. The use of a single expert is not mandatory,

and any party may choose to utilize its own expert. If all parties agree that the use of a single expert is desirable, the single expert shall be chosen by mutual agreement among the parties. If all parties agree that the use of a single expert is desirable, but the parties cannot agree on who should be selected, the referee may appoint a single consulting expert. The parties shall divide the costs of a single consulting expert equally among themselves unless a different cost allocation is agreed upon by the parties. If the parties agree to use a single expert in proceedings before the referee, then, absent the consent of all parties, that expert shall not be permitted to testify as an expert for a party in the same proceeding if the application is re-referred to the water judge or if a protest is filed by a party to the ruling of the referee.

**(k)** In consultation with the parties, the referee shall establish a case management plan for obtaining the necessary information and preparing a proposed ruling and proposed decree. The case management plan shall set forth a timetable for disposition of the application.

**(l)** Regardless of whether any expert is involved in the proceedings before the referee, the referee shall not be bound by the opinions and report of the expert, may make investigations without conducting a formal hearing, including site visits, and may enter a ruling supported by the facts and the law. The case management plan shall contain a listing of the disputed issues to the extent known, the additional information needed to assist in resolution of the disputed issues, additional investigations needed to assist in resolving the disputed issues, an estimate of the time required to complete the tasks, the time for filing a proposed ruling and proposed decree, the time for opposers to provide comments to the applicant on the proposed ruling and proposed decree, the time for the applicant to file status reports, and a schedule for further proceedings. The referee may make such interim rulings, including scheduling additional status conferences and allowing amendments to the case management plan, as will facilitate prompt resolution of the application and issuance of a proposed ruling and proposed decree. The proceedings before the referee shall be completed and the proposed ruling and proposed decree issued no later than 1 year following the deadline for filing of statements of opposition, except that the referee may extend the time as specified in subsection (f) above.

**(m)** If the parties are able to reach a resolution of the application, and the referee finds it to be supported by the facts and the law, the referee shall work with the parties to fashion an appropriate proposed ruling and proposed decree for filing with the water judge for approval. If such a resolution cannot be reached within the time period allowed by the case management plan, the referee shall enter a ruling on the application, which may be protested to the water judge as provided in C.R.S. § 37-92-304(2), or the referee may re-refer the application to the water judge, or any party may file a motion to re-refer the application to the water judge in accordance with C.R.S. § 37-92-303.

**(n)** At any time after the status conference on applications to which statements of opposition have been filed, or after the filing of applications to which no statements of oppositions have been filed, if some further information is reasonably necessary for the disposition of the application, the referee may require the applicant to supply the information in writing, by affidavit or at an informal conference or hearing. The referee may ask the division engineer for information as part of the referee's ongoing informal investigation, but shall discontinue making such requests if the state or division engineer has become a party to the case. In response to such

requests, the division engineer may file supplemental written summary of consultation reports. The division engineer also may file a written report in response to new information in any proposed ruling or expert report filed by the applicant within the time specified by the referee. If the referee determines any written report filed by the division engineer requires a response by the applicant, the applicant shall file a written response within the time specified by the referee.

(o) The referee shall enter minute orders summarizing all conferences with the parties or the division or state engineers.

(p) The referee shall have the authority to dismiss for failure to prosecute applications of parties who fail to comply with the requirements of the Water Court Rules or any case management plan, and to dismiss statements of opposition of parties who fail to comply with the requirements of the water court rules or any case management plan. Such dismissal may be protested to the water judge by any party within 21 days from the date of the order of dismissal.

(q) Any time period contained in the water court rules, or the applicable rules of civil procedure, for an action by the referee or a party may be extended by the water judge for good cause. At any time the water judge determines that an application can be resolved without adjudication by the water judge, the water judge may refer the application back to the referee for disposition. To assist in the adjudication of water matters that are before the water judge, the water judge may direct the referee to perform identified tasks.

#### **COMMITTEE COMMENT**

Rule 6(d), (e), (f), (h), (l) & (n)

Effective July 1, 2014, Rules 6(d), (e), (f), (h), (l) & (n) are amended to clarify the role of the division engineer during the water referee's investigation of each application and to ensure that the participation by the division engineer is clear, meaningful, transparent, and timely. Prior to these amendments, Rule 6(e) allowed the division engineer, upon the receipt of new information, to submit to the referee and the parties additional written reports after the division engineer's initial written report on the referee's consultation with the division engineer. The amendments move this provision to Rule 6(n) and modify it to clarify that the division engineer may file such written reports in response to new information in any proposed ruling or expert report filed by the applicant within the time specified by the referee.

To provide a more clear record of consultations between the referee and the division engineer, the amendments describe and permit the division engineer's filing of the initial written summary of consultation report as well as supplemental written summary of consultation reports in response to the referee's subsequent requests for information as part of the referee's ongoing informal investigation. The amendments further clarify which documents must be filed with the court so that they are provided to and received by the parties and the division engineer and, in Rules 6(e) and 6(n), affirm the referee's ability to require the applicant to file a written response to any of the division engineer's written reports to aid in the referee's investigation. To the extent practicable, the case management plan should be written or revised to include time schedules for the division engineer filing of all written reports and responses thereto.

The amendments to Rule 6(e) and 6(n) are intended to further implement the primary purpose of the referee's role in water court proceedings: to fashion a proposed decree that, with water judge approval, can be entered as a final decree if no protest to the referee's ruling is filed with the water court within the time the statute specifies. To this end, the General Assembly has authorized the referee to consult with the division engineer without the state or division engineer having to file a statement of opposition to the application. Rule 6 is also amended to adopt the "rule of 7" numbering for procedural time periods specified in this water court rule.

### **Rule 7. Intervention**

A Motion to Intervene shall be in accordance with C.R.S. 37-92-304(3). A failure to file a timely objection may be considered a confession of the Motion.

### **Rule 8. Briefs**

Briefs shall be filed and served in accordance with Water Court Rule 2. A brief shall not exceed thirty pages, double-spaced, without permission of the court. Counsel are encouraged to include a table of contents and a table of cases cited, which shall not be counted as part of the thirty-page limit.

### **Rule 9. Transfer of Conditional Water Right and Change of Address**

(a) Upon the sale or other transfer of a conditional water right, the transferee shall file with the water court having jurisdiction a notice of transfer which shall state:

- (1) The title and case number of the case in which the conditional decree was issued;
- (2) The description of the conditional water right transferred;
- (3) The name of the transferor;
- (4) The name and mailing address of the transferee; and
- (5) A copy of the recorded deed.

(b) The owner of any conditional water right shall notify the clerk of the water court having jurisdiction of any change in mailing address.

(c) The clerk shall place any notice of transfer or change of address in the case file in which the conditional decree was entered and in the case file in which the court first made a finding of reasonable diligence.

## **Rule 10. Exhibits**

All exhibits offered in evidence shall be marked for identification by the reporter during the trial, unless previously marked at the court status conference or pursuant to a case management order, and shall remain in the custody of the clerk or reporter as designated by the judge, unless withdrawn by order of the court.

## **Rule 11. Pre-Trial Procedure, Case management, Disclosure, and Simplification of Issues**

The provisions of C.R.C.P. 16 and 26 through 37 shall apply except that they shall be modified as follows:

**(a)** C.R.C.P. 16(b)-(e), C.R.C.P. 16(f)(3)(VI)(C), C.R.C.P. 16(g), and C.R.C.P. 26(a)(2)(B)(I)(g) shall not apply to water court proceedings.

**(b) Presumptive Case Management Order.** Except as provided in section (c) of this Rule, the parties shall not file a Case Management Order and subsections (1)-(10) of this section shall constitute the Case Management Order and shall control the course of the action from the time the case is at issue, unless the water court orders otherwise for good cause shown. The time periods specified in this Case Management Order are provided to take into account protested or re-referred cases that involve computer modeling or detailed technical analysis. Parties and counsel are encouraged to request a Modified Case Management Order, pursuant to section (c), to shorten time periods whenever possible, unless the water court orders otherwise for good cause shown.

(1) **At Issue Date.** Water matters shall be considered to be at issue for purposes of this Rule and C.R.C.P. 26 49 days (7 weeks) after the earlier of either of the following: entry of an order of re-referral or the filing of a protest to the ruling of the referee, unless the water court directs otherwise. Unless the water court directs otherwise, the time period for filing a Certificate of Compliance under subsection (b)(7) of this Rule shall be no later than 77 days (11 weeks) after a case is at issue.

(2) **Responsible Attorney.** For purposes of this Rule and C.R.C.P. 16(f), the responsible attorney shall mean applicant's counsel, if the applicant is represented by counsel, or, if not, a counsel chosen by opposers, or the water court may choose the responsible attorney. The responsible attorney shall schedule conferences among the parties, prepare and file the Certificate of Compliance, and prepare and submit the proposed trial management order.

(3) **Confer and Exchange Information.** No later than 14 days after the case is at issue, the lead counsel for each party and any party who is not represented by counsel shall confer with each other about the nature and basis of the claims and defenses, the matters to be disclosed pursuant to C.R.C.P. 26(a)(1), the development of a Certificate of Compliance, and the issues that are in dispute.

(4) Trial Setting. No later than 63 days (9 weeks) after the case is at issue, the responsible attorney shall arrange to set the case for trial pursuant to C.R.C.P. 121, section 1-6, unless otherwise ordered by the water court.

(5) Disclosures.

(A) The time for providing mandatory disclosures pursuant to C.R.C.P. 26(a)(1) shall be as follows:

(I) Applicant's disclosure shall be made 35 days after the case is at issue;

(II) An opposing party's disclosure shall be made 35 days after applicant's disclosures are made.

(B) The time periods for disclosure of expert testimony pursuant to C.R.C.P. 26(a)(2) shall be as follows:

(I) The applicant's expert disclosure shall be made at least 245 days (35 weeks) before trial;

(II) The applicant's supplemental expert disclosure, if any, shall be made after the first meeting of the experts held pursuant to subsection (b)(5)(D)(I) of this Rule, and served at least 182 days (26 weeks) before trial;

(III) An opposer's expert disclosure shall be made at least 126 days (18 weeks) before trial;

(IV) If the evidence is intended to contradict or rebut evidence on the same subject matter identified by another party under subsection (b)(5)(B)(III) of this Rule, such expert disclosure shall be made no later than 91 days (13 weeks) before trial.

(C) Additional Expert Disclosures. In addition to the disclosures required by C.R.C.P. 26(a)(2)(B)(I), the expert's disclosure shall include:

(I) A list of all expert reports authored by the expert in the preceding 4 years; and

(II) An executable electronic version of any computational model, including all input and output files, relied upon by the expert in forming his or her opinions. The court may require the party to whom this information is disclosed to pay the reasonable cost to convert the data from the electronic format in which it is maintained in the expert's normal course of business to a format that can be used by the expert for the opposing party(ies).

(D) Meeting of Experts to Identify Undisputed Matters of Fact and Expert Opinion and to Refine and Attempt to Resolve Disputed Matters of Fact and Expert Opinion.

(I) The expert witness(es) for the applicant and the opposer(s) shall meet within 49 days (7 weeks) after the applicant's initial expert disclosures are made. The meeting(s) may be in person or by telephonic means. The purpose of the meeting is for the experts to discuss the matters of fact and expert opinion that are the subject of the expert(s) disclosures and with respect to such

disclosures: to identify undisputed matters of fact and expert opinion, to attempt to resolve disputed matters of fact and expert opinion, and to identify the remaining matters of fact and expert opinion in dispute. The applicant may subsequently file a supplemental disclosure pursuant to Water Court Rule 11(b)(5)(B)(II) to address matters of fact and expert opinion resolved in or arising from the meeting(s) of the experts.

(II) The expert witness(es) for the applicant and the opposer(s) shall meet within 28 days after the opposers' expert disclosures are made. The meeting may be in person or by telephonic means. The purpose of the meeting is for the experts to discuss the matters of fact and expert opinion that are the subject of the expert(s) disclosures and, with respect to such disclosures: to identify undisputed matters of fact and expert opinion, to attempt to resolve disputed matters of fact and expert opinion, and to identify the remaining matters of fact and expert opinion in dispute. Within 21 days after such meeting, the experts shall jointly submit to the parties a written statement setting forth the disputed matters of fact and expert opinion that they believe remain for trial, as well as the undisputed matters of fact and expert opinion, arising from the expert disclosures.

(III) The content of the meetings of the experts and the written statement prepared pursuant to Water Court Rule 11(b)(5)(D)(II) shall be considered as conduct or statements made in compromise negotiations within the ambit of CRE 408. In addition, the content of the meetings, including notes taken by the experts or other records of the discussion during these meetings, are not discoverable, and can only be used for purposes of the preparation of the written statements and reports required or permitted by Water Court Rule 11(b)(5)(D). The meetings of the experts shall not include the attorneys for the parties or the parties themselves, unless they are the designated expert(s).

(E) Declaration by Expert. Expert reports, disclosures, and opinions are rendered to the water court under professional standards of conduct and duty to the court. No person, including a party's attorney, shall instruct an expert to alter an expert's report, disclosures, or opinion. This does not preclude suggestions regarding the factual basis, accuracy, clarity, or understandability of the report, disclosure, or opinion, or proofreading or other editorial corrections, or an attorney communication of legal opinion to the expert of the attorney's client. The expert shall not include anything in his or her expert report, disclosure, or opinion that has been suggested by any other person, including the attorney for the expert's client, without forming his or her own independent judgment about the correctness, accuracy, and validity of the suggested matter. Matters of legal opinion pertinent to formulation of the expert's report, disclosure, or opinion are within the professional province and duty to the court of the attorney who represents the client who has retained the expert. Each expert witness's written disclosure, report, or opinion shall contain a declaration by the expert as set forth in the applicable water court form.

(F) Proposed Decree. Applicant shall provide proposed findings of fact, conclusions of law and decree at the time of its initial C.R.C.P. 26(a)(2) disclosures. All opposers shall provide comments on the proposed decree, including the language of specific decree provisions deemed necessary by the opposers, at the time of opposers' initial C.R.C.P. 26(a)(2) disclosures. Applicant shall respond to opposers' suggested decree language by providing an additional draft decree at the time of its rebuttal C.R.C.P. 26(a)(2) disclosures. In circumstances where, as a

result of identification of witnesses and documents within the time frame for such identification set forth in this Presumptive Case Management Order but with insufficient time to allow responsive discovery or supplementation by an opposing party, then modification of this Presumptive Case Management Order shall be freely granted.

(6) Settlement Discussions.

(A) No later than 35 days after the case is at issue, the parties shall explore possibilities of a prompt settlement or resolution of the case.

(B) No later than 63 days (9 weeks) before trial the parties shall jointly file a statement setting forth the specific disputed issues that will be the subject of expert testimony at trial.

(7) Certificate of Compliance. No later than 77 days (11 weeks) after the case is at issue, the responsible attorney shall file a Certificate of Compliance. The Certificate of Compliance shall state that the parties have complied with all requirements of subsections (b)(3)-(7) (except (b)(5)(B) through (F) and (b)(6)(B)), inclusive, of this Rule or, if they have not complied with each requirement, shall identify the requirements which have not been fulfilled and set forth any reasons for the failure to comply. A request for a Case Management Conference shall be made at the time for filing the Certificate of Compliance.

(8) Time to Join Additional Parties and Amend Pleadings. The time to join additional parties and amend pleadings shall be no later than 119 days (17 weeks) after the case is at issue.

(9) Pretrial Motions. Unless otherwise ordered by the court, the time for filing pretrial motions shall be no later than 35 days before the trial date, except that motions pursuant to C.R.C.P. 56 shall be filed at least 84 days (12 weeks) before the trial date.

(10) Discovery Schedule. Until a case is at issue, formal discovery pursuant to C.R.C.P. 26 through 37 shall not be allowed. Informal discovery, including discussions among the parties, disclosure of facts, documents, witnesses, and other material information, field inspections and other reviews, is encouraged prior to the time a water case is at issue. Unless otherwise directed by the water court or agreed to by the parties, the schedule and scope of discovery shall be as set forth in C.R.C.P. 26(b), except that depositions of expert witnesses shall not be allowed until 28 days after the time for filing of the opposers' C.R.C.P. 26(a)(2) disclosures. The date for completion of all discovery shall be 49 days (7 weeks) before the trial date.

**(c) Modified Case Management Order.** Any of the provisions of section (b) of this Rule may be modified by the entry of a Modified Case Management Order pursuant to this section.

(1) Stipulated Modified Case Management Order. No later than 77 days (11 weeks) after the case is at issue, the parties may file a Stipulated Proposed Modified Case Management Order, supported by a specific showing of good cause for each modification sought including, where applicable, the grounds for good cause pursuant to C.R.C.P. 26(b)(2). Such proposed Order need only set forth the proposed provisions which would be changed from the Presumptive Case

Management Order set forth in section (b) of this Rule. The Court may approve and enter the Stipulated Modified Case Management Order, or may set a Case Management Conference.

(2) Disputed Motions for Modified Case Management Orders. Subsection (c)(4) of this Rule shall apply to any disputes concerning a Proposed Modified Case Management Order. If any party wishes to move for a Modified Case Management Order, lead counsel and any unrepresented parties shall confer and cooperate in the development of a Proposed Modified Case Management Order. A motion for a Modified Case Management Order and one form of the proposed Order shall be filed no later than 77 days (11 weeks) after the case is at issue. To the extent possible, counsel and any unrepresented parties shall agree to the contents of the Proposed Modified Case Management Order but any matter upon which all parties cannot agree shall be designated as “disputed” in the Proposed Order. The proposed Order shall contain specific alternate provisions upon which agreement could not be reached and shall be supported by specific showing of good cause for each modification sought including, where applicable, the grounds for good cause pursuant to C.R.C.P. 26(b)(2). Such motion need only set forth the proposed provisions which would be changed from the Presumptive Case Management Order set forth in section (b) of this Rule. The motion for a Modified Case Management Order shall be signed by lead counsel and any unrepresented parties, or shall contain a statement as to why it is not so signed.

(3) Court Ordered Modified Case Management Order. The water court may order implementation of a Modified Case Management Order if the Court determines that the Presumptive Case Management Order is not appropriate for the specific case. The Court shall not enter a Court Ordered Modified Case Management Order without first holding a Case Management Conference pursuant to subsection (c)(4) of this Rule.

(4) Case Management Conference. If there is a disputed Case Management Order or if counsel or unrepresented party believes that it would be helpful to conduct a Case Management Conference, a Notice to Set Case Management Conference shall be filed stating the reasons why such a conference is required. If a Notice to Set Case Management Conference is filed concerning a disputed Modified Case Management Order, or if the Court determines that such a conference should be held, the Court shall set a Case Management Conference. The conference may be conducted by telephone. The Court shall promptly enter a Modified Case Management Order containing such modifications as approved by the Court.

(5) Amendment of the Case Management Order. At any time following the entry of the Case Management Order, a party wishing to amend the presumptive Case Management Order or a Modified Case Management Order shall file a motion stating each proposed amendment and a specific showing of good cause for the timing and necessity for each modification sought including, where applicable, the grounds for good cause pursuant to C.R.C.P. 26(b)(2).

#### **COMMITTEE COMMENT**

Rule 11(b)(5)(D)(III)

Amended Rule 11, which became effective July 1, 2009, provides for meetings of the experts without attorneys for the parties or the parties themselves. Effective July 1, 2011, Rule

11(b)(5)(D)(III) was amended, nunc pro tunc on and after July 1, 2009, to make explicit the non-discoverability and non-admissibility of the notes, records, content of discussions, and the experts' written statement prepared in accordance with Rule 11(b)(5)(D)(II). In response to arguments that this provision does not prohibit use of such material in pretrial proceedings, Rule 11(b)(5)(D)(III) is further amended to clarify the original intent of the rule that the only permissible use of information from the expert meetings is for purposes of the preparation of the written statements and reports required or permitted by Rule 11(b)(5)(D). This clarifying change applies nunc pro tunc on and after July 1, 2009.

#### Rule 11(b)(9)

Effective July 1, 2014, Rule 11(b)(9) is amended to require that pretrial motions pursuant to C.R.C.P. 56 be filed 84 days before trial instead of 91 days before trial to allow the parties time to review any expert rebuttal reports prior to filing any Rule 56 motions. The purpose of this amendment is to reduce the potential for unnecessary, inappropriate, or moot motions or supplemental filings by the parties to address any new information in expert rebuttal reports.

Amended Rule 11, which became effective July 1, 2009, provides for meetings of the experts without attorneys for the parties or the parties themselves. Effective July 1, 2011, Rule 11 is further amended in subsection (b)(5)(D)(III) to make explicit the non-discoverability and non-admissibility of the notes, records, content of discussions, and written statement prepared by the experts in accordance with the rule, and, further, to clarify that the meetings of the experts exclude attorneys for the parties or the parties themselves unless they are designated experts. These clarifying changes apply nunc pro tunc on and after July 1, 2009.

In addition, the following Suggested Guide is included in this Comment by way of example for conduct of the meetings of the experts and preparation of the joint written statement of the experts.

### **Suggested Guide for Conducting Meetings of the Experts in Water Court Proceedings and Preparing Written Statement**

#### **Introduction**

The purpose of this guide is to assist experts engaged in water court cases to efficiently conduct the first and second meetings of the experts described in Water Court Rule 11 and prepare the written statement of the experts. As the title above indicates, this guide provides suggested procedures and guidelines in conducting these meetings and preparing the written statement. The experts in each case may adapt these guidelines for their own specific circumstances.

#### **Conduct of the Two Meetings**

Meeting Notes:

Water Court Rule 11(b)(5)(D)(III), as amended effective July 1, 2011 nunc pro tunc on and after July 1, 2009 reads:

“The content of the meetings of the experts and the written statement prepared pursuant to Water Court Rule 11(b)(5)(D)(II) shall be considered as conduct or statements made in compromise

negotiations within the ambit of CRE 408. For this reason, notes taken by the experts or other records of the discussion during these meetings shall not be discoverable, and none of the content of the meetings of the experts or the written statement prepared shall be admissible at trial. The meetings of the experts shall not include the attorneys for the parties or the parties themselves, unless they are the designated expert(s).”

Tips for Conducting the Meetings of Experts:

- Applicant's expert is the chair and therefore controls the flow of the meetings. If the Applicant has more than one expert in the case, one of its experts should be designated to run the meeting.
- Pass a signup sheet for names, phone numbers and email addresses.
- Prepare an agenda and stick to it.
- Limit protracted discussions and arguing.
- Don't become entangled in difficult issues and fail to cover others.
- OK to identify legal issues, but don't argue and discuss in detail.
- Try to keep meetings to a reasonable length.
- Participation in person is encouraged.

Scheduling the Meetings of the Experts:

Scheduling of the meetings of the experts is to be initiated by counsel for the parties, led by the attorney for the Applicant. The selected date should involve the largest number of participating experts possible. If scheduling does not permit one or more experts to attend, they have the option of submitting initial comments to the group via email prior to the meeting.

### **First Meeting of the Experts**

Excerpt from Rule 11(b)(5)(D)(I):

#### **“Meeting Of Experts To Identify Undisputed Matters of Fact and Expert Opinion and To Refine and Attempt to Resolve Disputed Matters of Fact and Expert Opinion.**

The expert witness(es) for the applicant and the opposer(s) shall meet within 45 days after the applicant's initial expert disclosures are made. The meeting(s) may be in person or by telephonic means. The purpose of the meeting is for the experts to discuss the matters of fact and expert opinion that are the subject of the expert(s) disclosures and with respect to such disclosures: to identify undisputed matters of fact and expert opinion, to attempt to resolve disputed matters of fact and expert opinion, and to identify the remaining matters of fact and expert opinion in dispute. The applicant may subsequently file a supplemental disclosure pursuant to Water Court Rule 11(b)(5)(B)(II) to address matters of fact and expert opinion resolved in or arising from the meeting(s) of the experts.”

Timing of First Meeting:

Within 45 days following Applicant's initial expert disclosures.

#### Goals:

- Allow Applicant's experts to explain the engineering approach in the application.
- Identify and screen issues pertaining to facts and expert opinions.
- Discuss Applicant's draft decree provisions dealing with issues of fact and expert opinion.
- Enable Applicant's experts to address potentially solvable issues of fact and expert opinion in a supplemental report prior to the opposers' disclosures.
- Clarify issues of fact and expert opinion and clear up misunderstandings relating to the case.
- Exchange information, such as additional backup data and calculations relating to the expert disclosures.

#### Not Goals:

- Solve legal issues.
- Achieve final settlement of the case.
- Engage in unproductive argument.
- Write decree language.

#### Suggested Sample Agenda for First Meeting of the Experts:

- Introductions, roll call, pass signup sheet.
- Set ground rules and goals of expert meeting.
- Applicant's experts give a brief overview of the application.
- Applicant's experts walk through facets of case, one at a time.
- Poll opposers' experts for whether or not they have issues for each facet.
- Note and put aside contested issues for later discussion.
- Opposers' experts discuss concerns regarding Applicant's initial disclosures.
- Go around table, each opposer's expert provides brief discussion of areas of disagreement.
- Provide alternative approaches if applicable.
- Applicant's experts verbally summarize issues discussed in meeting.
- Categorize issues into areas of agreement and disagreement.
- Q&A Session
- Exchange of information, arrange to provide additional backup information, if necessary.
- Schedule second meeting of the experts, if appropriate.
- Adjourn

#### **Second Meeting of the Experts**

##### Excerpt from Rule 11(b)(5)(D)(II):

“The expert witness(es) for the applicant and the opposer(s) shall meet within 25 days after the opposers' expert disclosures are made. The meeting may be in person or by telephonic means. The purpose of the meeting is for the experts to discuss the matters of fact and expert opinion that are the subject of the expert(s) disclosures and, with respect to such disclosures: to identify undisputed matters of fact and expert opinion, to attempt to resolve disputed matters of fact and expert opinion, and to identify the remaining matters of fact and expert opinion in dispute. Within 15 days after such meeting the experts shall jointly submit to the parties a written statement setting forth the disputed matters of fact and expert opinion that they believe remain for trial, as well as the undisputed matters of fact and expert opinion, arising from the expert disclosures.”

### Timing of Second Meeting:

Within 25 days following Opposers' expert disclosures.

### Goals:

- Identify and screen remaining disputed matters of facts and expert opinion.
- Discuss decree provisions dealing with matters of fact and expert opinion.
- Enable Applicant's experts to address potentially solvable matters of fact and expert opinion in their forthcoming rebuttal reports.
- Organize a plan and schedule for preparing joint written statement setting forth disputed and undisputed matters of fact and expert opinion.

### Not Goals:

- Solve legal issues.
- Achieve final settlement of the case.
- Engage in unproductive argument.
- Write decree language.

### Suggested Sample Agenda for Second Meeting of the Experts:

- Introductions, roll call, pass signup sheet.
- Set ground rules and goals for meeting.
- Applicant's experts walk through matters of fact and expert opinion identified in objectors' expert disclosures. Applicant's experts do the following for each issue:
  - Summarize the matter.
  - Identify which parties' experts raised the matter.
  - Ask objectors' experts for additional explanation or clarification, if necessary.
  - Indicate whether issue appears to be resolvable, not resolvable, or if there may be common ground to limit the issue.
  - Call on objectors' experts to comment on matter, and possible common ground.
  - Repeat for each matter.
- Objectors' experts indicate if there are other matters of fact and expert opinion that were not discussed by the Applicant's experts.
- Discuss process and schedule to prepare joint written statement.
- One of the Applicant's experts prepares first draft and emails to objectors' experts. This should be done quickly while contents of meeting are fresh.
- Objectors' experts email comments on draft written statement to all experts.
- One of Applicant's experts prepares final joint written statement, considering comments from objectors' experts. If, based on the comments from objectors' experts, any disagreement exists as to how an issue is summarized, then this disagreement should be set forth in the final joint written statement.
- One of Applicant's experts submits final joint written statement to all experts and to Applicant's attorney for distribution to parties.
- Adjourn meeting

## Purpose of Joint Written Statement

Excerpt from Rule 11(b)(5)(D)(II):

“Within 15 days after such meeting the experts shall jointly submit to the parties a written statement setting forth the disputed matters of fact and expert opinion that they believe remain for trial, as well as the undisputed matters of fact and expert opinion, arising from the expert disclosures.”

The written statement is not admissible at trial. The statement will be provided to all the parties and will be used by the attorneys when preparing a statement that will be filed with the court setting forth the undisputed matters of fact and expert opinion and the disputed matters of fact and expert opinion that remain for trial.

## Suggested Process to Prepare Joint Written Statement

One of the last agenda items for the second meeting of the experts should be discussion of the process, schedule and content of the joint written statement. One of the Applicant's experts should take the lead and prepare the first draft of the statement and send it to the other experts in the case. This should be done immediately after the meeting. Opposers' experts should promptly provide comments to Applicant's experts. If the experts cannot agree on specific language in the statement, this disagreement should be noted in the document. For guidance only, the following is a suggested outline of a sample written statement of the experts.

**Suggested Outline of Sample Written Statement of the Experts**  
**Case No. [xxCWxxx]**  
**Applicant: [name of applicant]**  
**Joint Statement of Undisputed Matters of Fact and Expert Opinion**  
**and Remaining Disputed Matters of Fact and Expert Opinion**  
**[Date]**

In accordance with Water Court Rule 11(b)(5)(D)(II) and the Case Management Order in Case No. [xxCWxxx], the experts shall jointly submit to the parties a written statement setting forth the disputed matters of fact and expert opinion that they believe remain for trial, as well as the undisputed matters of fact and expert opinion, arising from the expert disclosures. The first meeting of the experts working on this case was held at [location] on [date]. In attendance were [list of attendees, the objector that they represent, and whether they attended in person or by phone]. The second meeting of the experts in this application met at [location] on [date]. In attendance were [list of attendees, the objector that they represent, and whether they attended in person or by phone]. A draft of the joint written statement was prepared by [expert for applicant] and was delivered to the experts for objectors [objector No. 1, name of expert(s)], [objector No. 2, name of expert(s)], [objector No. 3, name of expert(s)] on [date]. Written comments were received via email from [name of expert] on [date] and [name of expert] on [date]. The following summarizes the undisputed the disputed matters of fact and expert opinion.

### **Undisputed Matters of Fact and Expert Opinion**

[The following is a small sample list of possible matters, depending on the case involved]

**1.** Use of the Glover bounded alluvial aquifer method with the input parameters included in Table x of the Applicant's Supplemental Expert Report is an appropriate method to determine the lagging of stream depletions from the subject wells included in the application.

2. A study period of 1950 through 2003 is an acceptable period of analysis for historical use of the xyz Ditch.
3. The historically irrigated area for the XYZ Ditch was 120 acres.
4. The historical cropping pattern for the XYZ Ditch was 50% corn and 50% alfalfa.
5. There is sufficient unappropriated water available in the Hopeful River Basin to justify the junior conditional storage right for the ABC Reservoir.
6. Use of a Modflow-based numerical ground water model is an appropriate method for estimating lagging of recharge accretions.

**Remaining Disputed Issues of Fact and Expert Opinion**

[The following is a small sample list of possible matters, depending on the case involved]

1. Whether or not the assumed 60 percent maximum irrigation field efficiency is appropriate for the subject irrigated lands under the xyz Ditch
2. Whether or not the 120 acres will dry up following the cessation of irrigation, or will evapotranspiration occur from shallow ground water.
3. Whether or not separate flow meters are needed to measure water pumped to each separate use under the wells.
4. Whether or not a 5 year projection tool for the plan for augmentation is sufficiently long to prevent injury.
5. Whether or not the Applicant has established a specific plan to use the water stored in the ABC Reservoir for industrial uses.
6. Whether or not the method of calculating future evaporation from the ABC Reservoir proposed by the Applicant is sufficient to prevent injury.
7. Whether the GGG Ditch historically irrigated 100 acres of land. Some of the objectors feel that there is insufficient factual basis to support the claimed 100 acres, and assert that additional investigation is needed.
8. Whether the river conductance value used by the Applicant in its Modflow River Package is correct.

Signed,

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[Expert No. 1]

[Expert No. 2]

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[Expert No. 3]

[Expert No. 4]

**Rule 12. Modification of Rules**

The requirements of these rules may be modified with approval of the water court upon agreement of the parties, or by the court, in exceptional cases to meet emergencies or to avoid substantial injustice or great hardship. Any request for modification shall be presented to the judge before whom the case is pending and shall state in writing the grounds supporting it. The

opposing party shall be given reasonable notice and an opportunity to contest the request in writing.

### **COMMITTEE COMMENT**

The amendment to the water court rules effective January 1, 2012 adopt the “rule of 7” numbering for procedural time periods specified in these water court rules. Statutorily-prescribed time periods incorporated into the rules have not been changed, except to express those time periods in numbers instead of words.

The amendments to water court rule 3 effective January 1, 2012 address applications that contain multiple claims, rights and structures, including applications filed by multiple applicants. Deletion of the words “and that each has the same ownership” from the former water court rule 3(b), now numbered water court rule 3(b)(1), is not intended to alter or change any provision of law pertaining to ownership of a claim, right or structure that may otherwise be applicable to the adjudication of an application.